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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 329

GENE BUCK, Individually and as President of the American Society of Composers, Authors and Publishers, *et al.*,

Appellants,

vs.

PHIL H. GALLAGHER, Individually and as State Treasurer of the State of Washington, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEES' BRIEF

G. W. HAMILTON, Attorney General of the State of Washington,
JOHN E. BELCHER, Assistant Attorney General of the State of Washington,
ALFRED J. SCHWEPPE,
Seattle, Washington,
Counsel for Appellees.

THE ARGUS PRESS, SEATTLE

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No. 329

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLEES' BRIEF

STATEMENT OF THE CASE

This is an appeal from a decree of dismissal, for want of jurisdiction, in an injunction suit brought by the plaintiffs herein to enjoin the defendant public officials of the State of Washington from enforcing a state statute (Laws of Washington 1937, Chapter 218) on the ground that such statute is in conflict with the Federal Constitution.

The bill of complaint, motion for interlocutory injunction, and supporting affidavits were filed May 28,

1937. The act, the enforcement of which was sought to be enjoined, went into effect on June 9, 1937 (Wash. Const. Art. 2, sec. 31; Wash. Const., Amendment 7). The appellees filed motions to dismiss (R. 221, R. 184) upon various grounds, including, among others, that the bill of complaint did not show, on its face, that the jurisdictional amount of $3,000 was involved as a prerequisite to federal jurisdiction of the cause, and also that the bill of complaint did not state a cause of action for relief in equity. The motions (R. 184, 221) also denied that the jurisdictional amount was involved and thus squarely put in issue at the hearing on the interlocutory injunction, the showing of jurisdictional amount in the entire record. *KVOS v. Associated Press*, 299 U. S. 269, 278; R. 272, 24 F. Supp. 541, 549; *First National Bank v. Louisiana Comm.*, 264 U. S. 308, 310. In addition thereto, the appellees filed affidavits in opposition to the application for the injunction (R. 225, R. 226, R. 239).

The cause came on to be heard before a statutory three-judge court under section 266 of the Judicial Code (28 U.S.C.A. §380) on June 29, 1937, upon the application for an interlocutory injunction, the opposing motions to dismiss and affidavits, and some oral testimony which appellants were allowed to introduce at that time (R. 242-5). After the hearing the court took the case under advisement. Some months later, to-wit, on February 9, 1938, the court invited additional briefs on the question of the jurisdictional amount involved in the case (R. 246; 247). On May 9, 1938, an opinion was filed by the three-

judge court, holding that the case should be dismissed for want of jurisdiction as a federal court, in that the jurisdictional amount was not involved (R. 248, *et seq.*; 24 F. Supp. 541).

The court limited its decision to that point only; it did not pass upon the equitable jurisdiction of the court, which was also challenged by the motion to dismiss; nor did it in any way whatsoever pass, in the exercise of its judicial discretion, upon the question whether an interlocutory injunction should be granted or denied upon the showing made in the affidavits and counter-affidavits.

For this reason, it may be here said parenthetically, if it be held on this appeal that the court below does have jurisdiction as a federal court, and that the complaint does state a cause within the equitable jurisdiction of the court, the cause must be remanded to the court below to pass on the merits of the application for an interlocutory injunction, because, under section 266, that is a matter addressed to the judicial discretion of the court below.

Bordens Co. v. Baldwin, 293 U. S. 194, 213;
Alabama v. U. S., 279 U. S. 229, 231;
Wilshire Oil Co. v. U. S., 295 U. S. 100;
Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 347.

On the point of the jurisdictional amount, the statutory court held both that the complaint did not allege a case within the jurisdiction of the court, and that in any event, the sufficiency of the jurisdictional amount having been challenged, the requisite amount had not been established by competent evidence.

On June 2, 1938, the complainants filed an application, returnable on the 28th day of June, 1938, why an order should not be made permitting the complainants to offer oral testimony by witnesses, at a time to be fixed by the court, or by deposition, at times and places to be fixed by the court, upon the question of the value of the matter in controversy and matters incidental thereto (R. 284). Appellees noticed for the same day the presentation of findings of fact, conclusions of law and decree of dismissal (R. 302). A hearing was had on the 28th day of June, 1938 (R. 286) at which hearing complainants' counsel, without having previously given notice of intention to do so, asked the court immediately to hear the testimony of three witnesses brought to the hearing. A colloquy then ensued between complainants' counsel and Presiding Judge Haney (R. 290-297) relating to the jurisdictional amount in controversy.

After hearing further argument on the matter of jurisdiction (R. 297-302) the court denied the application to take additional oral testimony (R. 303) and entered its findings of fact (R. 305) to the effect that the allegations of the bill of complaint are insufficient to show that the value of the matter in controversy exceeded the jurisdictional amount of $3,000; that the record does not show the value of the matter in controversy as exceeding the jurisdictional amount, and that the record does not show what is the value of the matter in controversy. And the court likewise filed its conclusions of law that neither the bill of complaint nor the record disclose that the matter is within the jurisdiction of the court, for want

of a requisite jurisdictional amount (R. 306). And in conformity with the findings and conclusions, the court filed its decree of dismissal on June 28, 1938 (R. 325) on the ground that neither the allegations of the bill of complaint nor the record showed the jurisdictional amount, and that the application for the injunction should be denied upon the ground that the cause was not within the jurisdiction of the court as a federal court. The merits of the application for the interlocutory injunction were in no way passed on.

This appeal followed.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This court noted probable jurisdiction on November 10, 1938, and assigned this cause for argument immediately following hearing of the appeal in *Gibbs v. Buck*, No. 276.

The appellees have heretofore filed in this cause an answer to the appellants' statement as to jurisdiction. In this answer the appellees suggest that the Supreme Court of the United States is without jurisdiction of this appeal. The reasons set forth in said answer will not be here repeated, except to point out that under the provisions of Section 266 of the Judicial Code (28 U.S.C. §380) a single District Judge can dismiss a cause as not within the jurisdiction of the federal court; that a three-judge court is requisite only where the lower court has jurisdiction of the cause as a federal court; that except where three judges are re-

quired, a direct appeal does not lie to this court. *Ex parte Poresky*, 290 U. S. 30, 31, 32; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16; *Ex parte Buder*, 271 U. S. 461; *Ex parte Hobbs*, 280 U. S. 168.

In *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386, 391, this court said that the issue was:

> "whether a final hearing by three judges was prescribed by that section, and hence whether this court has jurisdiction to hear the appeal * * *. When it becomes apparent that the plaintiff has no case for three judges, though they may have been properly convened, their use is no longer prescribed, and direct appeal here must fail, as well in this case, as where the plaintiff does not press his injunction, *Smith v. Wilson*, *supra*, or his constitutional attack."

In the present case, once it had been determined that the requisite jurisdictional amount was not involved to give the federal court jurisdiction, we suggest that the presence of three judges was no longer required, and that a direct appeal to the Supreme Court must fail.

> "The provision requiring the presence of a court of three judges necessarily assumes that the district court has jurisdiction * * *. That provision does not require three judges to pass upon the initial question of jurisdiction." *Ex Parte Poresky*, 290 U. S. 30, 31-2.

The fact that the three judges concur in the hold-

ing that the federal court is without jurisdiction, seems necessarily to imply that no case is presented for a three-judge federal court; and, therefore, no direct appeal will lie.

Under the decisions of this Court, Judge Cushman might have decided alone that the court was without jurisdiction because the requisite jurisdictional amount was not involved. In such case, manifestly no direct appeal would lie. The situation as to propriety of direct appeal would not seem to be changed merely because three judges concur in a decision which one has the power to make alone, and which if made by him alone would not warrant a direct appeal.

Subject, however, to the foregoing suggestion, we shall assume that the Supreme Court of the United States has jurisdiction of this appeal and address ourselves to the merits of the appeal, which involves solely the question whether the lower court had jurisdiction of the cause.

CRITERIA OF FEDERAL JURISDICTION

The established rule is that a plaintiff suing in a federal court must show in his pleadings, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction. *Smith v. McCullough*, 270 U. S. 456, 459; *Norton v. Larney*, 266 U. S. 511, 515; *Woods v. First Nat. Bank* (C.C.A. 9th) 16 F. (2d) 856; *Fourth Atl. Nat. Bank v. Boston* (C.C.A. 1st) 300 Fed. 29. It is not sufficient that the jurisdiction may be inferred argumentatively from the pleadings, but the averments should be positive. *Hanford v.*

Davies, 163 U. S. 273, 279; *Woods v. First Nat. Bank* (C.C.A. 9th) 16 F. (2d) 856; *Colgate & Co. v. Proctor & G. Co.* (D.C.) 25 F. (2d) 160, and cases cited. Jurisdiction cannot be presumed or inferred, nor founded on surmise. *Anderson v. Watt*, 138 U. S. 694, 702; *Colgate & Co. v. Proctor & G. Co.* (D.C.) 25 F. (2d) 160, and cases cited; *Lynch v. New York*, 293 U. S. 52, 54. The jurisdiction of the federal court being limited, and not general, the presumption is against jurisdiction unless it positively and affirmatively appears. *Hanford v. Davies*, 163 U. S. 273, 279; *Metcalf v. Watertown*, 128 U. S. 586; *Grace v. Central Am. Ins. Co.*, 109 U. S. 278; *Anderson v. Watt*, 138 U. S. 694, 702; *Woods v. First Nat. Bank* (C.C.A. 9th) 16 F. (2d) 856; *Hurley v. Wells-Newton Nat. Corp.* (D.C.) 49 F. (2d) 914, 917; *Colgate & Co. v. Proctor & G. Co.*, 25 F. (2d) 160.

The jurisdiction of the district court is to be determined by the allegations of the bill of complaint. *Moore v. Chesapeake & O. R. Co.*, 291 U. S. 205, 210, and cases cited; *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 189; *KVOS v. Associated Press*, 299 U. S. 269, 277; *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17.

In other words, the pleader must positively allege all the facts showing jurisdiction.

> "If he fails to make the necessary allegations, he has no standing." *McNutt v. Gen. Motors Acc. Corp.*, 298 U. S. 178, 189.

If, when all the allegations of the complaint are considered together, it cannot be fairly said that the jurisdiction appears on the face of the complaint, the

suit should be dismissed by the court *sua sponte*, or upon the defendants' own motion. *KVOS v. Associated Press*, 299 U. S. 269, 277; *Northern Pac. S. S. Co. v. Soley*, 257 U. S. 216; *Mitchell v. Maurer*, 293 U. S. 237, 244; *Minn. v. Northern Sec. Co.*, 194 U. S. 48, 62-3; *Gainesville v. Brown-Crummer Co.*, 277 U. S. 54; *U. S. v. Corrick*, 298 U. S. 435, 440.

It is only if the plaintiff has sufficiently *pleaded* the jurisdictional facts, that an inquiry will be made by the court, either on its own motion, or that of the defendant, for the purpose of determining whether the actual facts support the jurisdictional allegations of the complaint, by a preponderance of the evidence. *McNutt v. Gen. Motors Acc. Corp.*, 298 U. S. 178, 189; *KVOS v. Associated Press*, 299 U. S. 269, 277; *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17.

In the last cited case, *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17, this court denied leave to file an affidavit on the subject of jurisdictional amount, and held that the case should be decided on the record before the court; that the jurisdiction of the district court should be tested by the case made by the bill of complaint. This court, in denying leave to file the affidavit, said,

> "The court is of the opinion that the case should be decided on the record before it and that the jurisdiction of the district court should be tested by the case made by the bill of complaint." (303 U. S. 17, 19)

Only the allegations of the complaint, and not accompanying affidavits or testimony, can be considered in determining the sufficiency of the bill. *Missouri*

Pac. R. Co. v. Norwood, 283 U. S. 249, 253; *Polk Co. v. Glover*, 59 S. Ct. 15, 17.

The gradual increase in the jurisdictional amount was intended to curtail the jurisdiction of the federal courts. Congress having from time to time increased the jurisdictional amount, and having manifested its intention to leave cases involving lesser amounts to be exclusively dealt with by the state courts, "the policy of the statute calls for its strict construction," *Healy v. Ratta*, 292 U. S. 263, 270.

Confirmation of this policy may be found in a number of recent decisions of this court:

Healy v. Ratta, 292 U. S. 263, 270; *McNutt v. General Motors Acc. Corp.*, 298 U. S. 178; *KVOS v. Associated Press*, 299 U. S. 269; *Pope v. Blanton*, 299 U. S. 521; *Henneford v. Northern Pac. R. Co.*, 303 U. S. 17; *United States v. Corrick*, 298 U. S. 435, 440.

In the last cited case this court noticed lack of jurisdiction in the court below, although not raised by the parties.

Having in mind then the principles that the jurisdictional facts must be clearly and positively alleged, that jurisdiction cannot be presumed or inferred argumentatively, or otherwise, that the presumption is against jurisdiction, and that the burden is upon the complainant to establish the jurisdiction, we may consider briefly the legal principles relating to the sufficiency of allegations as to the jurisdictional amount, where required.

The formal allegation that the amount in controversy exceeds the sum of $3,000, exclusive of interests and costs, is sufficient, "unless the bill contains

others which qualify or detract from it in such measure that it cannot fairly be said that the jurisdiction appears on the face of the complaint, in which case the suit should be dismissed by the court *sua sponte*, or on defendant's motion." *KVOS v. Associated Press*, 299 U. S. 269, 277.

In *Lion Bonding Co. v. Karatz*, 262 U. S. 77, 86, this court said:

> "Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount, is therefore of no avail. *Vance v. W. A. Vandercook Co.*, 170 U. S. 468."

See to the same effect, *First Nat. Bank v. Louisiana Commission*, 264 U. S. 308, 310, where the bill and affidavits were held insufficient as to jurisdictional amount.

With these general principles in mind, we shall now submit reasons why the court below was without jurisdiction of this cause.

ARGUMENT

I.

The district court was without jurisdiction as a federal court to entertain the bill of complaint, because a jurisdictional amount of $3000.00 was required.

The present cause is one arising under the constitution and laws of the United States, and, therefore, under Section 24 of the Judicial Code (1) (28 U.S.C. §41 (1)) a jurisdictional amount of $3,000 was requisite. *U. S. v. Sayward*, 160 U. S. 493, 497, 498;

McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 182; *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 71-73; *Dewar v. Brooks* (D.C.) 16 F. Supp. 636, 638, 639.

Counsel's argument, on page 25 of appellants' brief, that they make a case under Section 24 of the Judicial Code (14) (28 U.S.C. §41 (14)) citing *Raich v. Truax*, 219 Fed. 273, 283, is conclusively disposed of by *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 71, 73, where the same section of the Judiciary Act was involved.

II.

The allegations of the complaint are not sufficient to sustain jurisdiction as to the society.

We set forth below all of the allegations of the bill of complaint bearing on the adequacy of the Society's showing of the requisite jurisdictional amount.

Appellant, the Society, alleges that the membership of the Society consists of more than 1,000 authors, composers and publishers of musical works; (R. 2) that the value of the matter in dispute between complainants and defendants is in excess of $3,000 (R. 4) and that the Society has "mutual working arrangements" with foreign societies of composers throughout the world, whose membership aggregate 44,000 individuals, to license the public performance of the compositions of the members of these foreign societies (R. 19). That an attempt to provide the information required by Chapter 218 of the Laws of 1937 of the State of Washington, with reference to the copyrights of the 44,000 members of the foreign societies, would

cost "far in excess of $50,000" (R. 20). That all the users of music in the State of Washington paid in 1936, $60,530.68 in license fees for the use of the musical compositions of the more than 44,000 composers represented by the Society and its affiliated foreign groups (R. 18, 21); and that the cost of attempting to compile the information and list required by the statute for the Society and its foreign affiliated societies would be in excess of $300,000, "which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers' fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses" (R. 22); that the enforcement of the statute would result in the loss to the Society of the revenue received by the Society from its license contracts within the State of Washington (R. 30).

The allegations as to the amount of $60,530.68 received in 1936 on behalf both of its thousand members and of the 44,000 members of the foreign societies, are obviously non-segregable, it being impossible for anyone to determine what proportion, if any, of the total amount collected was on behalf of the Society and its members and what on behalf of the foreign societies and composers. So far as appears from the complaint, the entire $60,530.68 collected in the State of Washington may have been paid to the 44,000 members of the foreign societies and nothing to the Society's own members. So far as appears from

the complaint none of the compositions of which the Society owns the public performing rights has ever been used in the State of Washington. The same impossibility of segregation exists with reference to the allegation of the cost of compiling the information required by the Washington statute, only a single amount being pleaded both for the Society and the 44,000 foreign composers.

These foreign composers or their societies are not parties complainant in this action. The Society's only allegation that it has "mutual working arrangements" with the foreign societies is a term so vague as to be meaningless. The "mutual working arrangements" themselves are not set out in the pleading. If the Society has adopted a plan of doing business which renders it impossible to establish the jurisdictional amount within established rules (See Circuit Judge Haney's observation, R. 290) that can hardly be the concern of any court or of these appellees.

The Society itself certainly cannot claim to stand here as a party complainant to defend the alleged treaty or financial rights of foreign composers under the vague and undefined allegation of "mutual working arrangements." The rule is clear that a party complainant can raise a federal question and claim the jurisdiction of a federal court only on his own behalf and no on behalf of third parties.

Ludeling v. Chaffe, 143 U. S. 301;
Giles v. Little, 134 U. S. 645, 649;
McCandless v. Pratt, 211 U. S. 437.

The principle is well stated in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 289:

"Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage."

There being no method of determining from the allegations of the bill of complaint in this action the value of the right of the Society and its own membership to license public performance of musical copyrights, or of ascertaining of any loss which the Society itself would suffer in the event the statute would be complied with, the Society has not made the requisite showing of $3,000, exclusive of interest and costs herein.

In the case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, this court clearly prescribed the test to be applied where an injunction is sought against the enforcement of a state statute. In that case, just as here, the complainants, for the manifest purpose of making the jurisdictional amount, set up large figures: that the net worth of the business exceeded $50,000; that it annually purchased in Indiana contracts aggregating in excess of $7,000,000; that it paid $13,000 annual rental in Indiana; that its Indiana payroll annually amounted to $150,000. This court said (p. 181):

"Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt v. New York Cotton Exchange*, 205 U. S. 322; *Bitterman v. Louisville & Nashville R. Co.*, 207 U. S. 205; *Berryman v. Whitman College*, 222 U. S. 334; *Glenwood Light Co. v. Mutual*

Light Co., 239 U. S. 121; *Healy v. Ratta*, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Moreover, under the rule of the *McNutt v. General Motors Acceptance Corp.*, 298, U. S. 178, case, even if the Society had in fact set forth in its bill of complaint a segregable amount representing the gross business done in this state for its membership, there would still be lacking in the record any statement of the "net worth or value" of that business, and of the

extent of the curtailment thereof and consequent loss which the enforcement of the statute would involve. In other words, if the gross business done within this state by the Society represented a loss, and not a gain, there would be no ascertainable net worth or value for any rights exercised by the Society within the state.

Furthermore, the bill of complaint clearly points out that the Society is a non-profit association organized for the purpose of protecting the performing rights of its members' copyrights (R. 13). The articles of association attached to the bill of complaint and incorporated therein as Exhibit "D" (R. 41-60) emphasize other allegations that the purpose of the Society is a non-profit organization to provide for them the collection of license payments and the distribution thereof to the members of the Society (R. 15, 16, 36-37).

The Society as a non-profit organization cannot of itself suffer any pecuniary loss, through the enforcement of this statute. The loss, if any resulted, would be suffered by the individual members through a diminution of their various distributive portions.

The situation in this case is governed by the rule laid down in the case of *KVOS v. Associated Press*, 299 U. S. 269. In that case the Associated Press, a membership corporation organized under the laws of the State of New York, sought to maintain an action as party plaintiff against a radio station which was pirating news gathered by the Associated Press for the use of its members and published in the newspapers owned by its membership. The showing was

made in that case that the total amount of the transactions carried on by the Associated Press amounted to many millions of dollars. The value of the news gathered was likewise distributed to its membership through the Associated Press releases and the publication thereof in the various newspapers. The cost thereof was equitably divided among the membership. The Associated Press in that case claimed that the pirating of the news jeopardized the $8,000 per month it received from the three newspapers in the area affected by the radio news broadcasting and that this amount in controversy was therefore in excess of the jurisdictional amount. The court, however, held, in denying the right of the Associated Press to appear as a party plaintiff for the reason that it had failed to satisfy the jurisdictional requirement, stating (p. 278):

> "* * * The motion required the trial court to inquire as to its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof. The only attempt to meet that burden is a reply affidavit filed on behalf of respondent, wherein it is deposed 'that the payments made by newspapers for said news sold to them by complainant in the territory served by said radio station is upwards of $8,000 per month, which is being imperilled and jeopardized by the acts of defendant * * * by its unlawful and wrongful appropriation of complainant's news, and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and

> complainant is in danger of losing said memberships and payments if defendant's practices in respect to pirating said news is not enjoined.' This deposition must be read in connection with the statement in the bill that the respondent makes no profit from furnishing news to its members but equitably divides the expense amongst them. The Association cannot, therefore, lose the $8,000 in question * * *."

In the instant case the Society, for and on behalf of its members, licenses the public performance of their copyrights. It distributes the value received for the various compositions less the cost of doing business among its membership. The Associated Press, a membership corporation, was likewise organized for non-profit purposes. If, in *KVOS v. Associated Press*, 299 U. S. 269, it was held that no loss could result to a non-profit corporation through the destruction of the value of its news distribution with a consequent loss to the corporation of $8,000 a month, then how can this unincorporated association claim that it can suffer any loss because of the reduction in amounts paid to its membership?

To paraphrase the language quoted above from *KVOS v. Associated Press*, 299 U. S. 269, the Society cannot itself lose the $60,530 in question. Any such reduction is represented solely, so far as the bill of complaint shows, by a reduction in the amount paid to its members and the foreign societies on account of the licensing of the public performance of their copyrights in the State of Washington.

The conclusion seems inescapable that the rule laid

down in *KVOS v. Associated Press*, 299 U. S. 269, directly applies, and that the Society as a non-profit corporation has failed to show a sufficient right or interest in the matter here in controversy.

III.

The jurisdictional amount as to the individual appellants has not been shown.

The allegations in the bill of complaint which appellants used in their attempts to sustain jurisdiction of the individual appellants, can be summarized as follows:

That each of the publisher appellants owned copyrights valued in excess of $1,000,000; that it would cost each of the publisher appellants in excess of $25,000 for payments to investigators, lawyers, clerks and other expenses to formulate a list of their respective copyrights containing the data required by the state statute (R. 8). That the individual composer appellants each owned copyrights having a capital value in excess of $100,000 (R. 9, 10, 11, 12). That it would cost the individual composer appellants to create an agency within the State of Washington to protect against infringement of their musical copyrights, in excess of $10,000, which expenditure would be necessary in the employment of investigators and other employees (R. 17). That each of the appellants received from the Society in the year 1936 amounts varying from more than $50,000 to amounts in excess of $5,000 for licensing the public performance of their works over the entire world (R. 29).

We refer only briefly to the mass of general conclusions in the bill of complaint involving claims of destruction of the value of the individuals' copyrights, the complete cessation of their income derived from the licensing of copyrights throughout the United States (R. 28, 29, 30, 31). Such general conclusions come within the condemnation often expressed by the federal courts and succinctly stated by a three-judge court in *Hale v. Mann*, 15 Fed. Supp. 1051, 1052, where it is stated:

> "While the bill is replete with legal conclusions and abstract statements to the effect that plaintiffs' business will be destroyed, there are no tangible facts pleaded to support these statements or to lead to any conclusion other than that the act simply constitutes a regulation of, and restriction on, plaintiffs' business. These views with regard to the bill are confirmed by an inspection of the act itself, which, of course, may be and should be considered by the court in connection with this motion to dismiss. If the effect of the act is not to entirely destroy plaintiffs' business, but simply to injure them in the conduct thereof, then it is necessary for them to make some showing both by way of pleading and proof as to the extent of that injury. This, in our opinion, they have signally failed to do upon the trial of the case * * *.
>
> "Accordingly, it follows from what has been said that the case will be dismissed for want of jurisdiction." (p. 1052)

In *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 96, this court said:

> "The bill contains general allegations of irreparable damage and deprivation of 'rights, liberty, properties, and immunities' without due process of law, if the statute be enforced. But the bill failed to state facts sufficient to warrant such conclusions, which alone were not enough."

The allegations as to the capital value of the copyrights owned by each of the individual appellants and their gross income therefrom, collected throughout the world, are ineffectual to establish the requisite jurisdictional amount on behalf of any individual appellant. *McNutt v. General Motors*, 298 U. S. 178. They do not show, in any measure, either the value of any right exercised and business done, or any loss suffered, by any appellant in the State of Washington through the operation of the statute. We are here dealing with a state statute operative only within the territorial limits of the state, which can damage each of the individual appellants only to the extent that it affects his business done within the state.

The only definite allegation concerning the value of each appellant's interest in the right to license public performance of musical copyrights, is the annual amount received by each of the appellants *throughout the United States and in foreign countries.* Nowhere is there an allegation that any individual appellant has ever received any amount, much less $3,000, from the licensing of the public performance of his copyrights in the State of Washington; nor, as a matter of fact, that a single piece of music belonging to the

individual complainants was ever publicly performed in the State of Washington.

Under the rule laid down in the case of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, there must be a positive showing that the net value of the individual's right sought to be protected is definite, and that the cost or loss incurred through the enforcement of the statute would reduce the value of that right by an amount in excess of $3,000. The rule of *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, has recently been affirmed in a case analogous to the instant case where this court directed the dismissal of *Polk, et al., v. Blanton, County Judge, et al.*, 10 Fed. Supp. pp. 15 and 18, by a *per curiam* memorandum (296 U. S. 521).

The case of *Polk Co., et al., v. Glover*, 56 Sup. Ct. Rep. 15, relied on by appellants, clearly conforms to the rule laid down in the earlier decisions. In this case, among other allegations, the bill of complaint stated that the complainants had on hand *in the state of Florida*, cans valued at $33,000, which the requirements of the Act in question would render useless. Clearly, an allegation that the Act rendered valueless property worth $33,000, located in Florida, was an affirmative showing of actual loss through the enforcement of the Act, the allegation being necessarily accepted as true for the purpose of considering the motion.

Appellants' contention that mere allegations of cost of conformity with the statute, without any affirmative showing that any of the individual appellants

has a right within the State worth more than the jurisdictional amount of $3,000, obviously cannot be sustained under the decisions of this Court. Appellants' view, if correct, would permit any complainant, without showing any, or perhaps only a nominal interest in the matter in controversy, to maintain an action in a federal court by the mere allegation that the cost of conformity to the statute would be in excess of $3,000. Under such reasoning a complainant, having a right within the state worth only $100, could establish the federal jurisdiction by a showing that cost of conformity would be in excess of the jurisdictional amount.

IV.

Individual appellants cannot aggregate the amount in controversy in order to make up the requisite jurisdictional amount.

Even assuming, for the sake of the argument, that the appellants in this case could, under proper circumstances, aggregate the value of their rights in this controversy, that situation is not here presented. To permit aggregation, there must be a showing of separate sums comprising a total amount representing interests of the individual appellants in the joint matter in controvesry. Here the only figures which appellants claim support an aggregation are the allegations that the amount of $60,530.68 represented the business done in 1936 by the Society and its foreign affiliates in the State of Washington, and that the alleged cost of $300,000 required to be expended by

the Society on behalf of its members and the 44,000 foreign composers. Obviously these sums include amounts due to and costs accruing to the 44,000 foreign composers as well as members of the Society and cannot be used as an aggregation of amounts in controversy belonging to the individual party plaintiffs.

Without a showing of the value of the right of each individual complainant in the State of Washington, there are, of course, no figures to aggregate.

On the other hand even if these individual appellants could claim a right in the public performance of their copyright apart from that represented by the Society, nowhere in the bill of complaint is there any statement as to the value of such a right within the State of Washington or the extent to which it would be affected by the statute. In any event no aggregation could be made of separate rights in various copyrights owned by separate individuals.

Buck, et al., v. Kloeppel, 10 Fed. Supp. 345;
Pinel v. Pinel, 240 U. S. 594;
Wheless v. City of St. Louis, 180 U. S. 379, 380;
Clay v. Field, 138 U. S. 464, 479;
Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77;
Hart Coal Corp. v. Sparks, 9 F. Supp. 825;
Dewar v. Brooks, 16 F. Supp. 636.

Counsel's further attempt to establish a jurisdictional amount for each individual appellant by aggregating the possible penalties which might be exacted under the provision of the act, requires but little notice. This court has held that amounts of penalties

incurred through failure to conform to statutes cannot be aggregated in determining the requisite jurisdictional amount.

In *Healy v. Ratta*, 292 U. S. 263, a case involving the collection of a tax, the claim was made that the penalty should be added to the tax in order to determine the jurisdictional amount. The court said, however, page 268:

> "It has been said that it is the value of the 'object of the suit' which determines the jurisdictional amount in the federal courts, *Mississippi & Missouri R. Co. v. Ward*, 2 Black 485; *Packard v. Banton*, 264 U. S. 140, 142. But this does not mean objects which are merely collateral or incidental to the determination of the issue raised by the pleadings. The statute itself does not speak of objects of the suit. It confers jurisdiction only if 'the matter in controversy exceeds * * * the sum or value of $3,000.00.' It has never been thought that the federal courts have jurisdiction of suits to restrain the collection of a property tax or other money exaction of less than the jurisdictional amount assailed as unconstitutional merely because the penalty for non-payment, which has not been incurred, exceeds that amount. *Atlantic Coast Line Ry. Co. v. Railroad Comm'n.*, 281 Fed. 321. The tax, payment of which is demanded or resisted, is the matter in controversy, since payment of it would avoid the penalty and end the dispute. See *Rose v. Prentiss*, 3 How. 771, 772."

V.

The individual complainants have no interest in the controversy sufficient to enable them to sue or to establish presently any jurisdictional amount on their behalf.

In Exhibits "B" and "C" to the Bill of Complaint (R. 34-37, 38-40) are set forth two typical contracts between the Society on the one hand and Carl Fischer, Inc., and Gene Buck respectively on the other. It is alleged that these contracts are similar to the contracts made by the Society with the other appellants (R. 15). All these contracts extend to the 31st day of December, 1940 (R. 15). Exhibits "B" and "C" contain the following identical provisions. The first paragraph of Exhibit "B" reads in part as follows (R. 35):

> "The Owner sells, assigns, transfers and sets over unto the Society for the term hereof, the entire exclusive right of public performance (as hereinafter defined) in each musical work:
>
> Of which the Owner is a copyright proprietor; or
>
> Which the Owner, alone, or jointly, or in collaboration with others, wrote, composed, published, acquired or owned; or
>
> In which the Owner now has any right, title, interest or control whatsoever, in whole or in part; or
>
> Which hereafter, during the term hereof, may be written, composed, acquired, owned, published or copyrighted by the Owner, alone, jointly or in collaboration with others; or
>
> In which the Owner may hereafter, during the

term hereof, have any right, title, interest or control, whatsoever, in whole or in part.

The exclusive right of public performance in every musical work shall be deemed assigned to the Society by this instrument and shall vest in and be the absolute property of the Society for the term hereof, immediately, upon the work being written, composed, acquired, owned, published or copyrighted."

Paragraphs 4 and 5 of Exhibit "B" read (R. 35-36):

"4. The Owner hereby irrevocably, during the term hereof, authorizes, empowers and vests in the Society *exclusively*, the right to enforce and protect such rights of public performance under any and all copyrights, whether standing in the name of the Owner and/or others, in any and all works copyrighted by the Owner, and/or by others; to prevent the infringement thereof, to litigate, collect and receipt for damages arising from infringement, and in its sole judgment to join the Owner and/or others in whose names the copyright may stand, as parties plaintiff or defendants in suits or proceedings; to bring suit in the name of the Owner and/or in the name of the Society, or others in whose name the copyright may stand, or otherwise, and to release, compromise, or refer to arbitration any actions, in the same manner and to the same extent and to all intents and purposes as the Owner might or could do, had this instrument not been made."

"5. The Owner hereby makes, constitutes and

appoints the Society, or its successor, the Owner's true and lawful attorney, irrevocably during the term hereof, and in the name of the Society or its successor, or in the name of the Owner, or otherwise, to do all acts, take all proceedings, execute, acknowledge and deliver any and all instruments, papers, documents, process and pleadings that may be necessary, proper or expedient to restrain infringements and recover damages in respect to or for the infringement or other violation of the rights of public performance in such works, and to discontinue, compromise or refer to arbitration any such proceedings or actions, or to make any other disposition of the differences in relation to the premises."

The appellants have bargained away under these contracts all rights of every description pertaining to the licensing of the performing rights in their copyrights. The statute under attack affects only the licensing of performing rights. Plainly the individual appellants have not and will not have until December 31, 1940, any interest in the matter in controversy sufficient to give them any standing as party complainants in this action or to establish any jurisdictional amount on their behalf.

Appellants have vested *exclusively* and irrevocably the right to bring any action to protect such public performance rights, and have disabled themselves from being parties to this proceeding.

VI.

If the three-judge court has jurisdiction as a federal court, this cause must be remanded for further proceedings.

In the court below the appellees moved against the complaint, not only on the ground of want of the requisite jurisdictional amount, but also on the ground that the record did not present a cause within the equitable jurisdiction of a federal court because complainants have a plain, speedy and adequate remedy at law (R. 222-3). The court below specifically deferred decision on this point (R. 272) because it was of the opinion that the record did not present a case within the jurisdiction of the federal court. Without doubt this court, if it finds the requisite jurisdictional amount to exist in this cause, could still sustain the decree of dismissal below, upon the ground that the record does not show a case within the equitable jurisdiction of the federal court. *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95-7.

This could be done for any one or more of the following reasons:

(a) The individual complainants have an insufficient interest to entitled them presently to the extraordinary relief of injunction. As individual copyright owners, they are exempted from the operation of the Washington Act (see section 3). Moreover, there is no allegation that any of the individual complainants' copyrighted music has ever been, or is being, illegally used in the State of Washington, or has ever been used there at all. So far as appears from the complaint, none of the music of which the Society

owns the public performance rights, may ever have been performed in the State of Washington. The entire $60,000 may have gone to the foreign composers with whom the Society has "working arrangements."

(b) The complainants can adequately interpose a defense to a criminal proceeding brought under section 11 of the Act, and such right of defense is an adequate remedy at law in a case like this.

Spielman Motor Co. v. Dodge, 295 U. S. 89, 96-7.

(c) The defendant deny (R. 223, 262) that they intend to enforce the criminal penalties of the Act until the validity of the Act has been adjudged, and this removes the case from the domain of affirmative equitable relief.

Spielman Motor Co. v. Dodge, 295 U. S. 89, 96-7;
Texas Co. v. Grosjean, 16 F. Supp. 264, 266;
Des Moines v. Des Moines Railway, 214 U. S. 179, 184;
Cincinnati v. Traction Co., 245 U. S. 446, 452-3;
F. C. Henderson v. R. R. Com., 56 F. (2d) 218, 223.

(d) Complainants can interpose their defense in an injunction suit brought by the prosecutor under section 9 of the Act.

Cincinnati v. Traction Co., 245 U. S. 446;
Des Moines v. Des Moines Railway, 214 U. S. 179;
Defiance Water Co. v. Defiance, 191 U. S. 184.

(e) There is no allegation that complainants have not complied and cannot comply, or that they have made any attempt to comply with the statute.

Columbia Building Co. v. Grange; 77 Fed. 798.

But even if this court holds that the court below had jurisdiction as a federal court, and also that it had jurisdiction as a court of equity (although the court below has not yet passed on this point) the cause must in all other particulars be remanded to the court below for further proceedings. That is to say, this court will send the case back to the court below to exercise its judicial discretion with reference to the granting or denial of a temporary injunction. That is a question to be passed upon in the first instance by the court below. *Bordens Company v. Baldwin*, 293 U. S. 194, 213; *Alabama v. U. S.*, 279 U. S. 229, 231; *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347.

As pointed out at the beginning of this brief, the court below based its decision entirely upon the lack of its jurisdiction as a federal court. It did not pass on the merits of the application for the temporary injunction upon consideration of the supporting and opposing affidavits. Until the trial court exercises its judicial discretion in this respect, there is nothing for this court to pass on.

> "It is well-established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the *trial court*; and that an order either granting or denying

such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama v. U. S.*, 279 U. S. 229, 231.

And the trial court, in granting or denying an application for an interlocutory injunction,

"is not bound to decide, upon the allegations of the bill, an important constitutional question, as to which the court * * * is in doubt, in advance of an appropriate determination by the * * * court of the facts of the case to which the challenged statute is sought to be applied." *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102-3.

Nor will this court, on the present appeal, pass upon any of the many constitutional questions sought to be raised. *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 103; *Bordens Company v. Baldwin*, 293 U. S. 194, 212-13; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347. Before this court will pass on constitutional questions, "the facts essential to their disposition should be definitely found by the lower courts upon adequate evidence." *Bordens Company v. Baldwin*, 293 U. S. 194, 212-13.

If this court remands the case to the court below, with directions to pass on the application for an interlocutory injunction, the court below in granting or denying such application would not have to pass on the constitutionality of the statute, but in the exercise of its judicial discretion could refuse to do so until all of the facts had been fully developed after final trial on the merits. *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102; *Allison v. Corson*, 88 Fed. 581; *Magnano*

Co. v. Dunbar, 2 F. Supp. 414; *Pacific Tel. & Tel. Co. v. Tax Comm.*, 180 Wash. 673; *Joplin & Pittsburg Ry. Co. v. Public Service Commission*, 267 Fed. 584, 587.

And if the court below granted or denied an interlocutory injunction, in the exercise of its judicial discretion, without passing on the constitutional questions, but reserving them for trial on the merits, this court would not disturb such a ruling on appeal, because said procedure is within the discretion of the court below. *Ibid.*; *Wilshire Oil Co. v. U. S.*, 295 U. S. 100, 102.

As a matter of fact, in *Gibbs v. Buck*, No. 276 (the companion case here from Florida) the three-judge court below based its brief decision granting an interlocutory injunction upon the ground just above stated, to-wit, that grave questions were involved which the court would not pass on at this time, but that it would grant an interlocuory injunction pending final hearing.

Consequently, for the reasons stated in the cases just mentioned, the three-judge order in *Gibbs v. Buck*, No. 276 (the companion case here) is not reviewable now, except upon the single question whether the court below had jurisdiction as a federal court. Under the decisions just cited it had the power to make the order appealed from without passing upon any of the constitutional questions, and deferring them until final hearing, provided it had jurisdiction as a federal court. If it entered such order without jurisdiction, then it committed an abuse of discretion. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52; *U. S. v. Corrick*, 298 U. S. 435, 437-8.

Under these well-settled principles, there is nothing to review here in either this case (No. 329) or the Florida case (No. 276) except the question of the jurisdiction of the court below. All of the constitutional questions sought to be raised and argued at length will, under well-settled rules, not be passed on by this court on these appeals. For that reason, we forbear to discuss them here. We merely note parenthetically that the only constitutional questions that are subject to decision in these cases at their ultimate stage fall within principles previously adjudicated by this court.

Allen v. Riley, 203 U. S. 347;
Patterson v. Kentucky, 97 U. S. 501;
John Woods & Sons v. Carl, 203 U. S. 358;
Ozan Lumber Co. v. Union Natl. Bank, 207 U. S. 251;
Carbide Corp. v. American Patents Corp., 283 U. S. 27, 33, foot-note;
Fox Film Corp. v. Doyal, 286 U. S. 123.

See also:

Straus v. American Publishers Ass'n., 231 U. S. 222, 234-5;
State of Washington v. American Society, etc., 13 F. Supp. 141.

CONCLUSION

Appellants advert to the fact that interlocutory injunctions have been granted in several other cases brought by these complainants in other states. Since appellants' brief was written, a statutory three-judge

court in Montana consisting of Haney, Circuit Judge, and Pray and Baldwin, district judges, on December 28, 1938, filed an opinion, dismissing complainants' suit in Montana for want of jurisdiction. The Montana three-judge court, to which application was made for a temporary injunction, summarized the Montana statute, and stated the principal facts which are in all respects similar to those in this case. The Montana three-judge court then continued in its opinion, which is not yet officially reported:

> "The bill was filed by three publishers, seven authors and composers (or their successors), all being the owners of copyrights, and by the president of the Society on behalf of all its members. The bill further alleged that the value of the copyrights owned by each publisher is in excess of $1,000,000; that the right to collect royalties and secure renewals of copyright by each of four authors and composers (complainants) is worth in excess of $100,000; that each of the publishers, and the authors and composers had made assignments to the Society of the right to issue licenses to publicly perform their compositions for profit; that the Society had issued about 208 licenses in Montana which were in force, and from which the Society received $17,709.55 in 1937; that 'the cost of even attempting to' file the required list would be far in excess of $50,000; that each of the publishers, for the year 1936 had received from the Society in excess of $50,000, that each of the authors and composers (complainants) had received from the Society for 1936 in excess

of $5,000, and that the publishers and the authors and composers will be entitled to receive a similar sum for each year to January 1, 1940, if their rights are not interfered with and destroyed by the statute. There was also a general allegation that the amount in controversy exceeded $3,000, exclusive of interest and costs. Other allegations regarding the impracticability and impossibility of complying with the statute, and the harm resulting from compliance, need not here be related.

"The suit was brought against the State Treasurer, State Auditor, Secretary of State of Montana, two prosecuting attorneys of that state and two unknown defendants. The named defendants filed elaborate motions to dismiss. One ground was that the amount in controversy does not exceed $3,000 exclusive of interest and costs.

"The proof of complainants is confined to the value of the copyrights owned, and the cost of preparing the list required by the statute. There is no proof of value of the right to carry on the business free of the Montana regulations, nor is there proof of the amount of the loss which will occur if the statute is complied with. There is no showing that the cost of compliance will not be returned in greater income. We think, as was held in a similar case, *Buck et al., v. Case, et al.*, (W. D. Wash.) 24 F. S. 541, that there is no showing that the requisite jurisdictional amount is involved. *Healy v. Ratta*, 292 U. S. 263, 267; *McNutt v. General Motors, etc., Corp.*, 298 U. S.

178, 181; *KVOS, Inc., v. Associated Press*, 299 U. S. 269, 277.

"Defendants may present an order of dismissal, based on the above-mentioned ground."

The foregoing decision follows that of the court below in the present case.

We respectfully submit that the decision of the lower court should be affirmed, upon the ground that it did not have jurisdiction as a federal court, or, in any event, as a court of equity; that if both of these positions be held erroneous, the cause be remanded to the court below for further proceedings.

Respectfuily submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 329.—October Term, 1939.

Gene Buck, Individually and as President of the American Society of Composers, Authors and Publishers, et al., Appellants, vs. Phil H. Gallagher, Individually and as State Treasurer of the State of Washington, et al.	On Appeal from the District Court of the United States for the Western District of Washington.

[April 17, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This is an appeal, under section 266 of the Judicial Code, from a decree dismissing appellants' bill to enjoin the enforcement by the appellees of a statute of the State of Washington.[1] The purpose of the statute is to render illegal certain activities carried on by pools of copyright owners in authorizing by blanket licenses the performance of their musical compositions.

The statute declares it unlawful for two or more persons holding separate copyrighted works to pool their interests in order to fix prices for their use, to collect fees or to issue blanket licenses for their commercial production. Joint undertakings for this purpose are permitted if the licenses are issued at rates assessed on a per piece system of usage. All combinations of owners of separate copyrighted musical works are required to file a complete list of these works once each year with the secretary of state of the State of Washington, together with detailed information as to prices and ownership. There are numerous other provisions unnecessary to detail.

The appellants are the American Society of Composers, Authors and Publishers; Gene Buck, suing in his own name and as the president of the Society; and a number of other members, corporate publishers and authors, composers or their next of kin. This suit was brought by complainants on behalf of themselves and others simi-

[1] Buck v. Case, 24 F. Supp. 541. Washington Laws 1937, c. 218, p. 1070.

larly situated, members of the Society too numerous to make it practicable to join them as plaintiffs in a matter of common and general interest. The bill alleges the organization of the Society as a voluntary, unincorporated, non-profit association under the laws of New York, and sets out that its purpose is to protect the owners of copyrighted musical works against piracies, to grant licenses and to collect royalties for the public performance for profit of the compositions of its members. These are composers, authors and publishers of musical compositions or their successors. The royalties and license fees collected by the Society are distributed from time to time, as ordered by the Board of Directors, among the members of the Society, after the payment of expenses of operation and sums due to foreign affiliated societies and after the deduction of a limited reserve fund.

In addition to the general allegation that the value of the matter in dispute is in excess of $3,000, the bill alleges that the value of each publisher's copyrights exceeds $1,000,000. The bill further shows that each individual complainant has rights to royalties and renewals worth in excess of $100,000. It is shown by the bill that in the State of Washington there were five hundred twenty-eight contracts outstanding in 1936, all entered into in the name of the Society, from which it received more than $60,000 and that similar sums annually will be collected. Other allegations are discussed later.

On the filing of the bill, a motion was made for an interlocutory injunction and affidavits were filed in support of the request. At the time the motion for a temporary injunction came on for hearing, the defendant state officers and certain intervenors filed motions to dismiss which challenged the bill on various grounds. The district court considered only one ground: whether the value of the subject matter in dispute is more than $3,000, exclusive of interest and costs. Upon the hearing, the district court found that neither the bill nor the record shows the necessary jurisdictional value and dismissed the bill. The basis for this ruling is treated here.

Although this statute of Washington, as that of Florida,[2] is aimed at the power exercised by combinations of copyright owners over the use of musical compositions for profit, the differences between the enactments and the procedural situations require additional consideration. The Florida statute does not permit

[2] Considered in Gibbs *v.* Buck, No. 276, October Term, 1938, decided today.

any combination of copyright owners for the purpose of licensing the use of their compositions. The prohibition is complete. In the Washington statute, on the other hand, such a combination, federation or pool is not prohibited if it issues licenses "on rates assessed on a per piece system of usage." Even upon these permitted transactions there are limitations of price and use, unnecessary to consider here.[3] The statute is directed particularly at the practice of issuing blanket licenses which authorize the performance of all copyrighted material belonging to the licensor. Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under section 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute.[4] Where the statute is regulatory the value of the right to carry on the business, as was said in *McNutt* v. *General Motors Acceptance Corporation*, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. The difficulties of determining the value of rights by calculating past profits as compared with possible future profits, influenced by the single factor of statutory regulation, are obvious. This difference is not the only test of the value of the right in

[3] Washington Laws, 1937, sec. 3, c. 218, p. 1071, reads as follows: "It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interest for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage; *Provided, further,* This act shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this act does business, and all groups and persons affected by this act, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

[4] Prohibitory statutes—Gibbs v. Buck, *supra;* regulatory statutes—McNutt v. General Motors Acceptance Corp., 298 U. S. 178, 181; Kroger Grocery Co. v. Lutz, 299 U. S. 300, 301.

question. The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation. This factor was not offered in evidence in the *McNutt* case.

In *Packard* v. *Banton*[5] the existence of the jurisdictional amount was partly determined by consideration of the cost of providing liability insurance required by a regulatory statute. Where a state railroad commission required the construction and service of an industrial spur which did not increase earning capacity, the cost was held to measure the jurisdictional amount.[6] The expense of producing the information required by a challenged order in a utility investigation was considered sufficient to establish the value of the matter in controversy.[7] The cost of complying with the challenged statute as a test of the value of the amount in controversy has been applied in effect in suits to enjoin the collection of taxes as unconstitutional interferences with the right to do business. In such cases "the sum due or demanded is the matter in controversy and the amount of the tax, not its capitalized value, is the measure of the jurisdictional amount."[8]

By section four of the Washington statute every combination of two or more copyright owners must file, once a year, with the secretary of state, a complete list of their copyrighted works, under oath.[9] By section three, individuals are forbidden from joining together "for the purpose of collecting fees in this state" unless their licenses are on a per piece system of rates. In addition to the general allegation that the value of the matter in controversy exceeds $3,000, the bill alleges the cost of compliance by the Society, the combination of members, with section four would exceed $300,000.[10] For the individual members who now have the benefits of

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[5] 264 U. S. 140.

[6] Western & A. R. R. v. Comm'n, 261 U. S. 264, 267.

[7] Petroleum Exploration, Inc. v. Comm'n, 304 U. S. 209, 215.

[8] Healy v. Ratta, 292 U. S. 263, 271, and cases there cited; Grosjean v. Am. Press Co., 297 U. S. 233, 241; Henneford v. No. Pacific Ry., 303 U. S. 17, 19.

[9] The list must state that it "is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work."

[10] Specifically the allegation is that "The cost to the Society of attempting to compile the lists and information required to be furnished under the State

the services performed by the Society, additional allegations set out the cost imposed upon them by the statutory regulation as being "in excess of $10,000" to each for carrying on for themselves the functions now performed for them by the Society. The motions to dismiss deny the general allegation of value, deny that there would be any cost to the Society by compliance with section four as the required list is already compiled and the expense, since the Society is non-profit, would be borne by members, and deny that the individual complainants would be put to a cost of $10,000 each. There was no allegation of the loss or cost to the Society or members occasioned by the requirement that the licenses from pooled copyrights should be issued at per piece rates.

On submission of the motion to dismiss for want of the jurisdictional value, the burden of proof was upon complainants.[11] Although the trial court called specific attention to the jurisdictional matters three months before it filed its opinion denying jurisdiction, by request for additional briefs, no evidence was offered. After the filing of the opinion and before the entry of the decree, on complainants' motion an order was entered to show cause why witnesses should not be heard on the value of the matter in controversy. The complainants furnished an uncontroverted affidavit stating that their failure to offer evidence was due to the fact that there was no denial of the facts pleaded. The offer of proof showed that it was desired "to offer the testimony of expert witnesses concerning the cost of complying with the requirements of Section 4 of the Act, and concerning the value of the property rights in question which will be affected by this Statute." The court did not reject the evidence as a matter of discretion because tardily presented. On the hearing on the rule the court made it quite clear that the proffered evidence was deemed immaterial because it showed only cost of compliance, not the value of the right to do business

Statute would be far in excess of $300,000; which sum would have to be expended for research work with reference to the past history of each and every copyright owner, by every one of the 44,000 members of the Society and its affiliated societies, lawyers fees for opinions as to the rights of parties involved with respect to the ownership, grants, licenses and other interests in the respective copyrights, clerical help and other incidental expenses; even with such an expenditure, it would be utterly impossible to furnish an accurate or complete list of all the respective copyrights of the members of the Society and of its affiliated societies with all of the data required by the State Statute."

[11] McNutt v. General Motors Acceptance Corp., 298 U. S. 178; 189.

free of the compulsion of the statute.[12] The application to take further testimony was denied and the motion to dismiss granted "in that this cause is not within the jurisdiction of this court as a federal court." We conclude that the refusal to permit additional evidence in these circumstances was error.

The complainants in this case are the same as those in *Gibbs* v. *Buck, supra.* In the *Gibbs* case we pointed out that the members share directly in the earnings of the Society and have a common and undivided interest in the right to license in association through the Society free of the provisions of the state statute. The allegations as to relationship between the Society and its members show the same status in this case. The fact that "neither practice nor rule of the committee concerning the apportioning among the Society's members of the pooled license fees realized is shown,"[13] does not affect the rights members have in the apportionment of the royalties from license fees. These rights are granted by the articles of association which are a part of the bill. *KVOS, Inc.* v. *Associated Press,*[14] relied upon below, is distinguished in the *Gibbs* case.

The cause will be remanded to the District Court with directions to permit the introduction of evidence and for further proceedings not inconsistent herewith.

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

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[12] R., p., this statement was made by the court: "Perhaps we are somewhat in the fog with respect to the matter you are trying to present but from our viewpoint it seems to us that you are urging that the value of the thing in controversy is to be measured by the cost of doing business or complying with the statute. From our standpoint we think the cost of doing business has nothing to do with the method of doing business. It is true the statute may necessitate a large expenditure but that would not mean anything because by a large expenditure you might make a much larger profit. Perhaps we don't understand each other but I think that is the basis of measuring the value of the matter in controversy."

[13] Buck v. Case, 24 F. Supp. 541, 549.

[14] 299 U. S. 269.